Supreme Court No. 80480-0
Court of Appeals No. 59821-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE PIER AT LESCHI CONDOMINIUM ASSOCIATION,
Respondent/Plaintiff

v.

LESCHI CORP.,
Petitioner/Defendant

ANSWER TO BRIEF OF AMICUS BLAKELEY VILLAGE, LLC

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I. ISSUE ADDRESSED BY AMICUS BLAKELEY VILLAGE, LLC

This appeal has raised numerous issues including whether the Association is bound by the arbitration clause in the Home Buyer's Limited Warranty, whether the arbitration scheme is enforceable under Washington's Arbitration Act and whether the condominium declaration requires arbitration. The brief of amicus Blakeley Village, LLC ("amicus Blakeley") focuses upon the issue of whether the Federal Arbitration Act ("FAA") applies to preempt the right of judicial review contained in the Washington Condominium Act ("Condo Act").[1] Notably, this determination is fact-specific and therefore, the issue cannot be, as amicus proposes, whether the FAA *always* preempts the Condo Act. The Association will limit this Answer to the issue of the application of the FAA in this case.

II. ARGUMENT

A. The FAA Does Not Apply to the Present Case.

The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving

[1] In responding to the *Brief of Amicus Blakeley Village, LLC in Support of Appellant* ("*Blakeley Brief*"), it was noted that the 20-page *Blakeley Brief* appears to use 10-point font in violation of RAP 10.4(a)(2). Presumably, use of the proper 12-point font would result in a substantially overlength brief in violation of RAP 10.4(b). Thus, to the extent that the Court desires additional rebuttal to the overlength *Blakeley Brief* not covered by these 20 pages, the Association would be happy to comply. The Association also requests that the Court impose sanctions in accordance with RAP 10.7, which the appellate court will "ordinarily impose" for failure to comply with the rules of RAP Title 10.

> commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[2]

9 U.S.C. § 2. The statute has been quoted here to demonstrate that the limits of its reach derive from the plain language itself; that the contract containing the arbitration provision is what must evidence interstate commerce. While reference has been made to the lack of contract defenses contemplated by the last clause of the statute in amicus Blakeley's Brief and as well as Appellant's Brief the existence of such defenses is not before the Court. The lower courts never reached this issue because they found that the FAA did not apply. Thus, this appeal will not determine whether any legal or equitable grounds exist to revoke portions of the contract, but it will determine whether the FAA applies to the particular facts in this case.

Amicus Blakeley raises the applicability of the FAA as the central issue in the case. Yet the FAA does not apply to preempt the Washington Condo Act here because the present case is neither a controversy arising under the contract containing the arbitration clause, nor does that contract (the "Home Buyer's Limited Warranty") evidence sufficient interstate commerce to come within the federal government's exercise of power.

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[2] 9 U.S.C. § 2

Thus, the superior court should be affirmed in this matter.

B. The Limited Warranty is the Contract at Issue.

As the condominium Declarant, Leschi Corp. authored the sales transaction documents, yet chose to include the arbitration clause only in "Home Buyers' Limited Warranty"("Limited Warranty") instead of in the actual purchase and sale agreements. CP 26; *see also* CP 386-98. This Limited Warranty was provided to purchasers as an addendum to the Public Offering Statement, which is a multi-page document containing detailed disclosures and attachments, but which is not part of the purchase and sale agreement. CP 381-98; RCW 64.34.410 & 415. In fact, PWC, the administrator of the Limited Warranty, is not a party to the purchase and sale agreements. CP 350-363.

Leschi Corp could have included the arbitration clause in the s documents, but instead provided it only as to the Limited Warranty and expressly provided that such warranty was a *stand alone contract*, completely separate from the construction or sale of the home:

> A. Separation of This LIMITED WARRANTY From the Contract Of Sale.
>
> This LIMITED WARRANTY is separate and *independent of the contract between YOU and US for the construction and/or sale of YOUR HOME.* The provisions of this Limited Warranty shall in no way be restricted or expanded by anything contained in the construction and/or sales contract between YOU and US.

CP 394 (emphasis added). Thus, the Limited Warranty should not be

viewed as an addendum dependent upon the other sales documents, but as a stand-alone contract as expressed in the agreement itself.

Amicus Blakeley completely ignores this fact and consistently errs in referring to the transaction at issue as either the construction of the condominium or the purchase of the condominium unit. As described at length in the Association's *Brief of Respondent,*[3] the arbitration clause appears nowhere but in the separate Limited Warranty. Thus, the Limited Warranty it is the contract that must be analyzed to determine whether it evidences interstate commerce as required by the plain language of the FAA.

C. The FAA Does Not Apply Because the Controversy Does Not Arise out of the Limited Warranty.

As a threshold matter, Leschi Corp. must prove that the FAA applies to this dispute at all. To compel arbitration under the FAA, Leschi Corp. "must make a threshold showing that a written agreement to arbitrate exists and that the contract at issue involves interstate commerce."[4] While amicus and Appellant have focused primarily on the applicability of the FAA based on the interstate commerce connection, Leschi Corp. has completely failed to prove that *the controversy in this case* arises out of that contract.

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[3] Brief of Respondent Pier at Leschi Owners Association ("Respondent's Brief") at § II B, p. 3-6 attached as Addendum A for the Court's convenience.
[4] *Walters v. A.A.A Waterproofing, Inc.*, 120 Wn. App. 354, 392, 85 p. 3d 389 (2004).

The Limited Warranty is a separate contract between the individual homeowners that make up the Pier at Leschi Owners Association and the appellant, Leschi Corp. CP 386-396. The Limited Warranty has particular coverage limits[5], subject matter coverage,[6] coverage limitations,[7] and a huge list of exclusions.[8] The Limited Warranty also requires notification of problems to the declarant in accordance with its terms.[9] Once notified, it allows the declarant to repair, replace or pay for the cost of repairing or replacing defects under the Limited Warranty.[10] The "Binding Arbitration" Procedure only comes into play if the buyer believes that declarant has not responded to the request for warranty performance to the buyer's satisfaction.[11] The Limited Warranty also purports to narrow the arbitrator's consideration of claims by limiting the scope of the arbitrator's determination to whether something is a construction defect *as defined by the Limited Warranty* rather than in accordance with the Washington Condominium Act.[12] Thus, it is clear

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[5] Section I, CP 388.
[6] Section II, CP 388.
[7] Section V, CP 389.
[8] Section VI, CP 390-391.
[9] *See* "Section III OUR Coverage Obligations" (CP 388) and "Section VII Procedure to Request US to Perform Under this LIMITED WARRANTY" (CP 391).
[10] Section V (CP 389-390); Section VII, D (CP 392)
[11] Section VII, E "If YOU Disagree with US" CP 392.
[12] It is notable that Appellant argues on the one hand that the arbitration clause covers all claims relating to the purchase and sale agreement, yet the language of the Limited Warranty limits the arbitrator's scope of review to only those claims arising under the Limited Warranty and its definitions. This language clearly vitiates the interpretation

that the arbitration provision contained within that Limited Warranty applies to claims *arising under* that implied warranty. This is consistent with the fact that none of the purchase and sale agreements actually contain arbitration agreements applicable to those disputes; they merely reference the one contained within the Limited Warranty.[13]

Here, it is undisputed that the Association has made no claims under the Limited Warranty. The Association's claims arise under the provisions of the Washington Condominium Act and Consumer Protection Act and under common law for breach of the implied warranty of habitability, but no claims have been made under the Limited Warranty. CP 3-10. By its own language, the FAA is designed to enforce arbitration agreements contained in contracts to the extent that the action is to settle a controversy "*arising out of such contract or transaction.*"[14] The present controversy simply does not arise out of the contract containing the arbitration clause. Therefore, the FAA does not apply.

This clear application of the FAA's "controversy" limitation makes sense because, based on the way the arbitration clause is referred to in the purchase and sale documents, most reasonable people would interpret the

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that all claims are subject to arbitration, as you cannot both require all claims to be subject to arbitration, but only allow the arbitrator to consider certain claims. *See* CP 395 ("Section X Definitions").

[13] See Addendum A, *Respondent's Brief* §B, p 3-6.

[14] 9 U.S.C. § 2.

arbitration clause to apply only to claims arising out of the Limited Warranty. Even though the terms of the arbitration clause attempt to extend its requirements to claims outside of the reach of the Limited Warranty, the restriction of the FAA's application to claims arising out of the contract containing the clause prevails. Thus, the FAA does not apply.

D. Even if the FAA Applies to this Controversy, the Limited Warranty Does not Evidence Interstate Commerce.

The interstate commerce connection required under the FAA has evolved over the years and has been interpreted differently in different jurisdictions, resulting in a somewhat confusing body of law seemingly establishing a commerce clause reach that is potentially so broad that no contract can escape its grasp. But in order to give any force to the limitations contained within the express language of the FAA, such a contract must exist. As the Supreme Court most recently stated, "the power to regulate commerce, though broad indeed, has limits."[15] As described above, the application of the FAA is limited to *controversies* arising under the contracts containing the arbitration provisions. As a matter of balance between the state and federal governments, it is also limited to those contracts that evidence interstate commerce. That nexus to interstate commerce must be found *in the contract containing the arbitration clause.*

Focusing on the proper application of the FAA as determined by

[15] *Citizen's Bank v. Alafabco*, 539 U.S. 52, 58 (2003).

the United States Supreme Court and other authority of precedential value, it becomes clear that there are now essentially two ways in which the party seeking to enforce the arbitration clause can prove the involvement of interstate commerce: Either 1) the contract itself specifically evidences interstate commerce by having a sufficient contacts with interstate commerce; or 2) the subject matter of the contract is, in the aggregate an economic practice subject to substantial federal control.

The first test depends upon the details contained within the contract and requires a party to tally up the interstate commerce connections evidenced by the agreement containing the arbitration clause. *Allied-Bruce*[16] is the quintessential example of this specific interstate nexus or contact tallying. The second requires no such tallying – it just analyzes the subject matter of the contract containing the clause to see if it is of the type that is generally subject to federal control. *Citizen's Bank*[17] is the seminal "subject matter" or "aggregate" case. Despite some of the broad language used in describing the policy behind the FAA, when the precedential cases are analyzed carefully, it is clear that both tests require direct connections to the contract containing the arbitration clause under the plain language of the FAA itself.

The Court of appeals properly focused its attention on the Limited Warranty – the contract containing the arbitration clause, in finding that the Limited Warranty did not evidence interstate commerce. As in *Marina*

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[16] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).
[17] *Citizen's Bank.*, 539 U.S. 52.

Cove[18] and *Satomi,*[19] the Limited Warranty here does not affect interstate commerce either specifically or in the aggregate.

1. The Limited Warranty Has Insufficient Specific Contacts with Interstate Commerce.

In addition to repeating the purported indicia of interstate commerce alleged by Appellant,[20] amicus Blakely analogizes the present case to *Allied-Bruce*, in which the Supreme Court held that the contract containing the arbitration clause – a service contract to kill termites – evidenced interstate commerce[21]. But the analogy is inapt because the court in *Allied-Bruce* focused on the *actual contract* containing the arbitration clause, which called for the use of specific interstate materials in the performance of the contract. The Limited Warranty does not call for the use of interstate goods. It is simply a promise regarding the quality of the fully built Washington condominium purchased in a separate transaction. As described in more detail below, instead of looking at the actual terms of the contract containing the arbitration clause, amicus Blakeley first overgeneralizes the subject matter of the contract, then attempts to identify interstate connections with that overly broad subject matter, essentially combining the two types of FAA analysis.

Amicus Blakeley's argument can be diagrammed as follows:

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[18] *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001).
[19] *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 156 P.3d 460 (2007).
[20] The Association addressed Appellant's claims regarding the construction materials and other indicia of interstate contacts at length in its Brief of Respondent and will not repeat those arguments here.
[21] *Allied-Bruce Terminix*, 513 U.S. 265.

1. The Limited Warranty is the contract containing the arbitration clause

2. The Limited Warranty relates to the quality of the condominium;

3. The Condominium was purchased in a residential real estate transaction; and

4. Residential real estate transactions *in the aggregate* are subject to federal control.

Even presuming that all real estate transactions are subject to federal control (which the Association certainly does not concede), that analysis cannot be applied under the *Allied-Bruce* type test because the focus must be upon the contract containing the arbitration clause, not the expanded subject matter of the agreement. In contrast, the actual analysis applied in *Allied-Bruce* is much more direct:

1. The extermination agreement is the contract containing the arbitration clause; and

2. The extermination contract specifically refers to use of pesticides that traveled in interstate commerce.

Allied-Bruce properly focused upon the actual contract containing the arbitration clause in conducting its analysis. Amicus refuses to do so. When the proper focus is put upon that contract, it becomes clear that it in no way evidences interstate commerce. Therefore, the superior court's decision should be affirmed.

2. The Limited Warranty Does Not Represent an Economic Activity that in the Aggregate Is Subject to Federal Control.

The Limited Warranty agreement is not enforceable under the FAA because its subject matter is not generally subject to federal control in a substantial way. In the seminal Supreme Court FAA case, *Citizen's Bank v. Alafabco*,[22] the Court held that a dispute arising out of a debt-restructuring contract containing an arbitration clause was arbitrable under the FAA because the subject of the contract in dispute – debt restructuring – was "in the aggregate" an economic activity subject to substantial federal control.[23] Thus, when amicus Blakeley argues that *Citizen's Bank* had an even slighter nexus with interstate commerce than the present one,[24] it confuses the analysis. *Citizen's Bank* is not a contact-tallying case, but one that was determined on the basis of the subject matter of the contract and whether it is of a type that is generally subject to federal control. This distinction was affirmed by the Court of appeals in *Satomi*.[25]

In support of its finding that the debt-restructuring agreement was of the type generally subject to federal control, the Court cited the "magnitude of the impact on interstate commerce caused by t*he particular economic transactions in which the parties were engaged . . .*"[26] The Court also affirmed that the general practice evidenced by the contract must "bear on interstate commerce in a substantial way."[27] Finally, the Supreme Court emphasized that the commerce clause connection was

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[22] *Citizen's Bank* 539 U.S. 52.
[23] *Id.* at 57.
[24] *See Brief of Amicus Blakeley Village, LLC in Support of Appellant ("Blakeley Brief")* at 4.
[25] *Satomi*, 159 P.3d at 465, n. 22.
[26] *Citizen's Bank*, 539 U.S. at 57-58 (emphasis added).
[27] *Id.* at 57.

virtually inherent in the commercial lending transaction: "No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."[28] In contrast, an elaborate explanation is required (as provided by amicus) to reach the conclusion that the subject of the Limited Warranty somehow substantially impacts interstate commerce.

As this court held in *Marina Cove,* and affirmed in *Satomi*, a limited warranty provided as part of a condominium sales transaction simply does not share the same attributes as the massive debt-restructuring agreement in *Citizen's Bank:* "[T]hese transactions have none of the earmarks of an economic activity that in the aggregate would represent a general practice subject to federal control,"[29] explaining that "the giving of the warranty is not a transaction involving commerce, because in the aggregate or otherwise, it does not represent a general practice subject to federal control."[30]

As described in more detail below, amicus bootstraps the FAA analysis by first fudging on the subject matter of contract containing the arbitration clause (again referring to the purchase of the condominium even though that is *not* the subject of the Limited Warranty), then asking whether the expanded subject matter (a real estate purchase) is the sort of

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[28] *Citizen's Bank* at 58 *(citing Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38-39 (1980)).
[29] *Satomi*, 139 Wn. App. at 188;.*see also Marina Cove*, 109 Wn. App at 244
[30] *Id; see also Addendum B, Respondent's Brief* at § III D, 2 p. 21-26

thing that, in the aggregate, is subject to substantial federal control. The combining of these approaches to establish an interstate nexus results in a situation in which *no contract* is beyond the reach of the FAA.

3. Amicus Blakeley Combines the Two FAA Analyses to Find an Interstate Connection, Resulting in Absurd Results.

Amicus Blakeley's argument relies entirely upon the faulty premise that the Limited Warranty is the equivalent of a real estate purchase that, in the aggregate, substantially impacts interstate commerce. Using this assumption, amicus compares the facts of the present case with those of *Allied-Bruce*, arguing that the contract in *Allied-Bruce* was even more local than the Limited Warranty here.[31]

In so doing, amicus must compare the use of interstate goods specifically evidenced by the extermination contract in *Allied-Bruce* to the condominium purchaser's rights to use a dock and fixtures which are incidental not to the Limited Warranty, but to the purchase of the condominium. However, unlike the use of interstate pesticides in *Allied-Bruce*, the dock and fixture uses here are evidenced nowhere in the Limited Warranty contract, nor in the actual purchase and sale agreements. The interstate nature of these products – the dock and fixtures – are not only far removed from the Limited Warranty, they are far removed from the actual purchase of the condominium.

What amicus is attempting to do is to combine the two FAA tests

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[31] *Blakeley Brief* at 6.

by first expanding upon the contract at issue to look at it in the aggregate (constantly referring not to the Limited Warranty, but to the construction or purchase of the condominium and associated ancillary rights), and then pointing out the tenuous connections between that expanded subject matter and interstate commerce. Using amicus's own example, the interstate connection is seven steps removed from the Limited Warranty:

1. Limited Warranty Agreement contains arbitration clause;
2. The Limited Relates to quality of condominium;
3. Condominium was purchased;
4. Buyer owns unit plus interest in common elements;
5. Common elements include use of a dock;
6. Dock was leased to condominium by third party;
7. Third party had a guarantor of the lease; and
8. The guarantor was out of state.

Here the interstate connection is extremely far removed from the contract containing the arbitration clause. Under the proper analysis, the interstate connections must either derive directly from the contracting containing the arbitration clause *or* the subject matter of the contract is of the type that is generally subject to federal control. None of the cases cited by amicus support the combining of these analyses. Otherwise, there would be no contract beyond the reach of the FAA, which is essentially amicus Blakeley's argument. Certainly, this analysis is a far cry from the determination in *Citizen's Bank* that "[n]o elaborate explanation is needed to make evident the broad impact of commercial lending on the national

economy or Congress' power to regulate that activity pursuant to the Commerce Clause."[32]

The absurdity of this position can be demonstrated with a short hypothetical: I contract with my neighbor to buy a five-foot strip of his property adjoining mine for $500. We agree in the contract to arbitrate any disputes. He conveys the 5-foot strip, but I do not pay. Due to the prohibitive cost of arbitration and unavailability of arbitrators, a hypothetical state statute provides for judicial enforcement of claims under $1,000 in small claims court. Under amicus Blakeley's analysis, this contract, though purely local in nature, would be subject to the FAA because although the contract itself is limited in scope, it is, in essence, a real estate purchase agreement. And, their argument goes, since some real estate purchases are subject to federal control, there is a sufficient nexus between this agreement and interstate commerce. Perhaps they would claim the $500 I was going to use to purchase the property was earned from out-of-state endeavors, or perhaps I was going to borrow the money from my interstate bank to pay for the land. Thus, they would argue that the transaction is cloaked in interstate commerce and the arbitration clause must be enforced. Allowing this type of bootstrapped analysis leads to a situation in which there is simply no such thing as a local contract beyond the reach of the FAA: something the Supreme Court continues to deny.

If this Court is prepared to hold that a Limited Warranty

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[32] *Citizen's Bank, 539 U.S.* at 58 *(citing Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38-39 (1980).

Agreement, an intangible promise relating to property that is a creature of state law (a condominium), that has existed as an integrated building in the state for years prior to the sale is subject to federal control, simply because the building is comprised of interstate materials or because some owners used money from interstate sources, then it must also be prepared to hold that no contract is beyond the FAA's grasp.

4. Amicus Blakeley's Focus on Civil Rights and Real Estate Cases is Misplaced.

Amicus Blakeley depends almost entirely upon general commerce clause cases, beginning with the inaccurate statement that "there is no relevant distinction between the scope of Congress's power to regulate real estate transactions in general and its power to regulate real estate transactions by requiring enforcement of arbitration agreements."[33] This is the biggest analytical error made by amicus and its fatal flaw. The court of appeals clarified the distinction between the FAA commerce clause test and the commerce clause tests in other cases, explaining that there is a difference between whether a contract containing an arbitration clause evidences interstate commerce and whether a *business* does.[34]

In relying upon non-FAA commerce clause cases, amicus Blakeley demonstrates its misunderstanding of the analysis required under the FAA. The key difference between these and the FAA cases is that in order for the FAA to apply, *the contract containing the arbitration clause* must

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[33] *Blakeley Brief* at p. 9.
[34] *Satomi*, 139 P.3d at 188

evidence a transaction affecting interstate commerce, whereas the civil rights cases, for example, require only that the *business* sought to be regulated affect interstate commerce.[35]

Similarly, Amicus Blakeley cites a number of cases in support of its argument that the Limited Warranty here is "part of an economic activity that, in the aggregate, represents a general practice subject to federal control – namely, residential real estate sales."[36] Putting aside the fact that the test is *not* whether the contract is "part" of something bigger that is subject to federal control, even the non-precedential cases cited by amicus Blakeley do not support this position. *See, e.g., McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 246 (1980) (relating to the "effect on interstate commerce" test that is part of the jurisdictional element of Sherman Act); *Washington Manufactured Housing Ass'n v. PUD No. 3 of Mason County*, 124 Wn.2d 381, 387, 878 P.2d 1213 (1994) (holding that local regulation was *not preempted* by federal statute and does not violate commerce clause test based on commerce clause balancing test completely unrelated to FAA analysis: "[T]he distinction between permissible and impermissible impact on interstate commerce

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[35] The analysis under the civil rights cases is whether a public accommodation's "*operations* affect commerce." Title II, Sec. 201(b), 42 U.S.C. § 2000a(b). Thus, instead of focusing on a contract containing an arbitration clause as required by the FAA, each of the civil rights cases cited by amicus focuses not upon the contract as required by the FAA, but on the business as a whole to determine whether it sufficiently impacted interstate commerce to be regulated by the federal government. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964) (barbeque restaurant's *operations* impacted interstate commerce).

[36] *Blakeley Brief* at 6.

involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the burden imposed on interstate commerce test."); *Groome Resources Ltd., LLC, v. Parish of Jefferson*, 234 F.3d 192, 206 (5th Cir. 2000) (analyzing whether the *enactment* of the Fair Housing Amendments Act was a valid exercise of Congress' commerce clause authority, which requires far less than the FAA: that the activity be economic in nature and an "essential part of a larger regulation of economic activity.")

None of the cases cited by amicus stand for the general proposition that all real estate transactions are subject to the FAA.[37] In fact, the cases merely demonstrate that *some* real estate transactions are subject to federal control under different commerce clauses analyses If anything, what these cases do demonstrate is that there are a variety of tests used under various federal statutes to determine whether there is sufficient interstate commerce connections for the federal statute to apply or whether the federal statute was properly enacted as an exercise of the commerce clause.

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[37] Nor is Amicus Blakeley's reference to the Condominium and Cooperative Abuse Relief Act of 1980 instructive where the Act, which allows a condominium association to terminate long-term leases entered into by declarants, expressly declared the existence of federal involvement with a specific subset of issues relating to condominium housing markets in section 3601(a)(4). Such a declaration contained in a statute is reviewed only under the rational basis test, which is far different from requiring a court to determine whether, in fact, interstate commerce is evidenced by a contract on a case-by-case basis. *See Bay Colony Condo. Owners Ass'n v. Origer*, 586 F. Supp. 30, 32 (D.C. Ill. 1984) ("Instead of requiring judicial determination of The effects on interstate commerce in each particular case, Congress has decided to regulate a class of activities within the cooperative and condominium housing markets.")

In terms of the analysis, there is a "distinction between legislation limited to activities *in* commerce and legislation invoking Congress' power over activities that *affect* commerce.[38] Amicus Blakeley repeatedly errs in citing to this Court the wrong standards gleaned from the real estate cases and especially when it cites *Gonzales v. Raich*[39] for the proposition that the FAA applies here. Once again, *Gonzales* was a case in which the Court was charged not with determining whether an activity or contract evidenced interstate commerce, but whether the interstate involvement declared by a particular regulatory scheme enacted by Congress (in that case, the Controlled Substances Act of 1970) bears a rational relationship to its exercise. Thus, the *Gonzales* court reiterated that "when a general regulatory statute bears a substantial relation to commerce, the *de minimus* character of the individual instances arising under that statute is of no consequence."[40] Again, this is completely different from the analysis under the FAA, which requires that the court find that the contract at issue evidence interstate commerce. Here, the Court is not asked to determine whether the FAA is an acceptable exercise of the Commerce Clause, but whether, under the particular facts presented, the FAA applies. The focus must remain on the proper test under the FAA that requires analysis of the specific contract containing the arbitration clause. The non-FAA cases cited by amicus Blakeley simply do not assist this court with the proper

[38] *U.S. v. Logan*, 419 F.3d 172 (2nd Cir. 2005) (*citing Jones v. United States,* 529 U.S. 848, 855-56 (2000)).
[39] *Gonzales v. Raich*, 545 U.S. 1 (2005).
[40] *Id.* at 17.

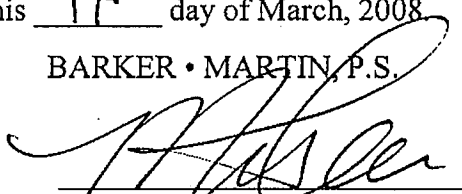
FAA analysis.

III. CONCLUSION

When one properly focuses the analysis upon the contract containing the arbitration clause – the Limited Warranty – it is clear that the FAA does not apply because: 1) the claims do not arise under the Limited Warranty; and 2) the Limited Warranty does not evidence interstate commerce. Regardless of which FAA analysis is applied, whether it be the totality of contacts tests per *Allied-Bruce* or the subject matter/aggregate test under *Citizen's Bank*, the result must be that the Limited Warranty is one of those few contracts that simply is not subject to the FAA. Thus, the superior court's decision should be affirmed.

Respectfully submitted this 17th day of March, 2008.

BARKER • MARTIN, P.S.



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Addendum A

No. 59821-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LESCHI CORP., a Washington corporation,

Appellant.

v.

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION, a Washington non-profit corporation,

Respondent

BRIEF OF RESPONDENT THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION

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following oral argument on March 16, 2007. CP 620-22. Leschi Corp. did not move for reconsideration. The Notice of Appeal was filed on April 9, 2007, after which Leschi Corp. moved this Court for a stay of the trial court matter.[1] The stay was granted and an accelerated briefing schedule was set by this Court's clerk.[2] Thus, the Association will not re-address the arguments regarding the stay contained in Appellant's Opening Brief.

B. **The Limited Warranty is the Contract At Issue.**

As the Condominium Declarant, Leschi Corp. was the seller of all units and thus, the author of the sales transaction documents. CP 26. As the drafter of the documents, Leschi Corp. could have included an arbitration clause in each actual purchase and sale agreement ("PSA") or in the numerous other notices provided to prospective purchasers. Instead, it only included it in a document entitled the "Home Buyer's Limited Warranty" ("Limited Warranty"). *See* CP 386-98. This Limited Warranty was provided to purchasers as an addendum to the POS. CP 381-98.

Other sales documents merely acknowledge the existence of the arbitration scheme contained in the Limited Warranty. In this respect,

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[1] *See Leschi Corp.'s Motion to Stay Trial Court Proceedings.*

[2] *See* June 20, 2007 from Court Administrator/Clerk Richard D. Johnson.

Appellant Leschi Corp.'s statement of facts is misleading. The PSA does not contain an arbitration scheme. The first *reference* to an arbitration scheme is that contained in an addendum to the PSA:

> 15. WARRANTIES. Owner acknowledges and agrees: . . . . i. That the *limited warranty* provides an Alternative Dispute Resolution process. . . . 31. MEDIATION/ARBITRATION. All disputes involving Seller, Buyer and/or Owners Association shall be resolved by the mediation/arbitration provisions *of the Limited Warranty* . . . ."

CP 358 (emphasis added). This "Standard Addendum to Condominium" refers explicitly to the fact that the Limited Warranty, not the PSA, provides for alternative dispute resolution. Similarly, Defendant quotes the POS's *acknowledgement* that the Limited Warranty provides for alternative dispute resolution: "The POS also includes a similar provision requiring arbitration: 'Buyer acknowledges and agrees: . . . . g. that the *Limited* Warranty provides an Alternate Dispute Resolution Process . . . ."[3] Again, these paragraphs, contained in an addendum to the POS merely acknowledge the existence of the arbitration provision in the Limited Warranty. They do not themselves contain an arbitration provision. Only the Limited Warranty itself, provided to owners not as an addendum to the PSA, but as an exhibit to the POS, contains an actual arbitration clause.

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[3] *Brief of Appellant* ("*Opening Brief*") at p. 15.

CP 386-398. Ultimately, Appellant appears to concede this point when it mentions the repeated "references" to binding arbitration rather than repeated arbitration clauses.[4]

Throughout its brief, Appellant treats the Limited Warranty as synonymous with the PSA, yet, by its own terms, the Limited Warranty is a stand-alone contract. It states:

> A. Separation of This LIMITED WARRANTY From the Contract Of Sale.
>
> This LIMITED WARRANTY is separate and independent of the contract between YOU and US for the construction and/or sale of YOUR HOME. The provisions of this Limited Warranty shall in no way be restricted or expanded by anything contained in the construction and/or sales contract between YOU and US.

CP 394. For whatever reason, when the document was drafted, the clear and express intent was that it should be a separate contract and be interpreted as such. This is consistent with the fact that arbitration is only referenced, not repeated, in the other sales documents. Thus, the Limited

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[4] *Opening Brief* at pp. 24-25. The statement appears in the context of Appellants' argument that because of the repeated references, the arbitration clause is not unconscionable. Appellant also states that no evidence has been provided that the clause is subject to contract defenses (*Opening Brief* at p. 29). While the Association *does* contend that the binding arbitration scheme, contained in an adhesion contract which gives all rights of control to the declarant and none to the Association, is unconscionable and subject to other contract defenses, that issue has not yet been reached and is not a subject of this appeal. Only if the clause is enforceable under the Federal Arbitration Act do the terms of the particular arbitration scheme become relevant. Thus, the Association will not respond to those contentions at this time.

Warranty should not be viewed as an addendum dependent upon the other sales documents, but as a stand-alone contract.

C. Evidence of Interstate Commerce Presented by Appellant Relates to the Construction or Sale of the Units, Not the Warranty.

The Condominium was originally operated as an apartment building until Leschi Corp. purchased the building and made some renovations. CP 4, 384, 402, 414. In its Opening Brief, Leschi Corp. details the use of out-of-state materials and companies to renovate the Condominium. For the purposes of this appeal, the Association does not dispute that the renovations conducted by Leschi Corp. *as the general contractor* involved use of building and other materials that, at some point, traveled in interstate commerce. As recently held by this Court in *Satomi*,[5] however, and as detailed below, that is simply insufficient to trigger application of the FAA.

D. Attorneys' Fees May be Awarded to the Prevailing Party.

Appellant seeks to force the Association to arbitrate its Condo Act claims in derivation of the Condo Act's provision for judicial review. The Condo Act provides for attorneys' fees to the prevailing party.

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or

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[5] *Satomi*, 159 P.2d 460.

Addendum B

No. 59821-0-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LESCHI CORP., a Washington corporation,

Appellant.

v.

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION, a Washington non-profit corporation,

Respondent

BRIEF OF RESPONDENT THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION

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> because a refrigerator or a brick was manufactured in another state. The condominium owners purchased real property, not building materials, goods or services.[28]

In the present case, the real estate purchased is arguably even more local, since the purchasers bought condominiums that had previously existed for years as apartments, and only recently renovated and sold as condominiums. As in other condominium construction defect cases, the Declarant, Leschi Corp., contracted with the original purchasers to convey a fully constructed piece of real property located in Washington state. Leschi Corp. did not sell construction services or individual components. Thus, even if the contract in question were the individual purchase and sale agreements, those agreements do not involve interstate commerce. Therefore, the FAA cannot apply.

2. The Involvement of Interstate Commerce in the Limited Warranty Here Is Indistinguishable from That in *Marina Cove* and *Satomi*.

Appellant Leschi Corp. also attempts to distinguish the Limited Warranty in this case from that in *Satomi* by arguing that the sales transactions here were somehow unique, involving one or two out-of-state purchasers, some out-of-state lending and minor federal regulation. But these facts do not distinguish the Limited Warranty transaction from that in *Marina Cove* or *Satomi*, in which the court held that the involvement of

[28] *Id.* at 468.

interstate commerce was clearly insufficient. First, as detailed above, it is the Limited Warranty that is at issue, not the entire sales transaction.

Second, the fact that a small minority of the buyers at the Condominium may have purchased a unit from another state or used an FHA loan[29] is insufficient to convert the sales of all units into transactions sufficiently involving interstate commerce for the FAA to apply. As the court held in *Marina Cove*, such contact with other states is "negligible"[30] because the court must look at the totality of the contacts with interstate commerce. Notably, two out-of-state cases cited by Appellant in which the court held that the sale was subject to the FAA involved one, not 28 sales.[31] Thus, the court in that case focused on whether that one sale sufficiently evidenced interstate commerce.[32] Here, even if the Court looks at the broad sales transactions as the contracts at issue rather than focusing upon the Limited Warranty itself, the focus must be on whether the totality of the transactions sufficiently evidence interstate commerce or whether the contact is, as *Marina Cove* held, "negligible."

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[29] As Appellant admits, there is no evidence that any FHA loan was used by purchasers at the Pier. *See Opening Brief* at p. 34. Nor can the court rely upon Appellant's *assumptions* that out-of-state purchasers traveled to Washington to view the condo units purchased for investment reasons (*id.* at p. 39) or that they accepted rents via interstate transfer (*id.* at p. 11).

[30] *Marina Cove*, 109 Wn. App. at 243-44.

[31] *See AmSouth Bank v. Dees*, 847 S.2d 923, 936 (Ala. 2002) ; *Rainwater v. National Home Ins. Co.*, 944 F.2d 190 (4th Cir. 1991).

[32] *Id.*

Other extra-jurisdictional cases cited by Appellant in which the court held that the contracts evidenced interstate commerce are distinguishable based upon the contract analyzed. *See, e.g., AmSouth Bank v. Dees*, 847 S.2d 923, 936 (Ala. 2002) (financing contract between mortgagor and out-of-state mortgagee was the contract at issue, funds borrowed were substantial and multiple out-of-state entities were involved in the transaction); *Hedges v. Carrigan*, 117 Cal.App.4th 578, 11 Cal.Rptr. 3d 787 (2004) (arbitration agreement was contained within actual purchase and sale agreement, joint escrow instructions and in the deposit receipt, subjecting each contract to review for sufficient interstate contacts).

Neither does the fact that real estate sales are governed in part by federal housing regulations distinguish this case from *Marina Cove* or *Satomi* or making it a "general practice subject to federal control" where the transactions in *Marina Cove* and *Satomi* were not. In fact, all real estate transactions are governed by federal law in the respects referenced by Appellant, which primarily relate to real estate financing. In this case, real estate financing is so removed from the contract containing the arbitration clause – the Limited Warranty – that it cannot be considered. The Limited Warranty does not "evidence interstate commerce" because of federal regulation on financing when financing is one more step removed from the purchase and sale agreements, which is two steps

removed from the Limited Warranty (through the POS and the PSA). Thus, federal regulation of real estate financing does not cloak the Limited Warranty with sufficient evidence of interstate commerce to allow the FAA to apply.

The extent and purpose of the Limited Warranty here is identical to that in *Marina Cove* and *Satomi* and the sales transactions are the same "garden variety Washington real estate deal[s]." Thus, the trial court's decision upholding judicial review of the Condo Act claims should be affirmed.

Finally, Appellant argues that the mere fact that it contracted with a third party based in Virginia to administer the Limited Warranty converts an otherwise completely local agreement into one sufficiently involving interstate commerce. But PWC's actual involvement with the process is exaggerated by Leschi Corp. PWC is not a party to the Limited Warranty, nor was it issued by PWC. To the contrary, under the Limited Warranty, the obligations and responsibilities run between Leschi Corp. and those unit owners who are subject to it. The Limited Warranty makes that clear:

> WE [Leschi Corp.] have contracted with PWC [Professional Warranty Service Corporation] for certain administrative services relative to this LIMITED WARRANTY. PWC's sole responsibility is to provide administrative services.

> Under no circumstances or conditions is PWC responsible for fulling OUR obligations under this LIMITED WARRANTY.[33]

Under the Limited Warranty, Leschi Corp. receives the notice of any claims, has the duty to respond and perform repairs, and bears the ultimate liability.[34] PWC's limited administrative service is only triggered if Leschi Corp. fails to adequately respond and mediation and arbitration becomes necessary. Even then, PWC is only a coordinator of the arbitration. Thus, it can hardly be said that PWC issued the warranty or that its minimal administrative role impacts interstate commerce.

Notably, Appellant has not alleged that PWC has administered or processed even one claim on behalf of the homeowners at the Condominium. In fact, PWC's services with respect to arbitration are largely illusory because the arbitration provision in the Limited Warranty cannot be enforced under Washington law. Thus, it can hardly be said that the administration of an unenforceable arbitration provision rises to the level of involving interstate commerce. PWC's minor role simply cannot convert what would otherwise be a completely local agreement providing warranties between Washington parties into one affecting interstate commerce to the extent that the FAA applies.

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[33] CP 388.

[34] *Id.*

Here, the Limited Warranty relates solely to agreements regarding warranties on 28 Washington homes. The parties to the agreement are the seller (Declarant, Leschi Corp., a Washington corporation formed solely for the purpose of renovating Washington apartment buildings and selling them as condos) and purchasers buying condominium units within the state of Washington. The Limited Warranty is part of a specific agreement pertaining to express warranties as authorized by RCW 64.34.443. While interstate commerce may have been involved with Leschi Corp.'s contracts with others, interstate commerce was not involved in the contract at issue between the Leschi Corp. and the unit purchasers.

The *Satomi* court did not rely solely upon mere examination of the specific language of the limited warranties, but found that the overall transaction for the sale of a condominium was uniquely governed by state law. "Real property has historically been the law of each state. The sale of property including the requirements for and interpretation of purchase agreements, is entirely governed by state law."[35] *Id.* In this respect, the present case is indistinguishable from *Satomi*. The fact that Leschi Corp as the general contractor (not the seller of condominiums) contracted with

[35] *Satomi*, 159 P.3d at 467.